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Supreme Court of the United States

No. 263

UNITED STATES OF AMERICA
(APPELLANT BELOW),

VS.

JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS (APPELLEES BELOW).

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

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UNITED STATES OF AMERICA
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JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS (APPELLEES BELOW).

PETITION FOR REVIEW ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

To the United States Supreme Court, and the Honorable Judges Thereof:

Come now the petitioners, JOSEPH F. BENT and WILLIAM AMOS JONES, and pray that a writ of certiorari be issued to review a decree of the Circuit Court of Appeals for the Eighth Circuit (Case No. 13906) entered in this Cause rendered June 20, 1949 (R. 24), and became final July 14, 1949 (R. 31), said order reversing an order of the United States District Court for the Western Division, Western District of Missouri that was rendered December 3, 1948 (R. 10), setting aside judgment and sentence of petitioners rendered against petitioners on July 10, 1946, on Count 2 of their indictment.

OPINION BELOW.

Circuit Court of Appeals' Opinion, not yet officially reported, but appears R. 14-23. Opinion and order of District Court for Western Division of Western District of Missouri (R. 6-10).

SUMMARY AND SHORT STATEMENT OF MATTERS INVOLVED, INCLUDING STATUTE INVOLVED.

Petitioners were indicted on May 28, 1946, in the United States District Court For The Western Division Of The Western District Of Missouri, Case No. 16463, in three Counts: COUNT I, for robbing a clerk in charge of a Post Office; COUNT II, by use of a dangerous weapon, putting in jeopardy the life of the clerk; and COUNT III, for conspiring to rob the clerk in charge of the Post Office (R. 6). Their indictment was under Sec. 320, Title 18, U. S. C. A., which Section Number was endorsed at the top of the Indictment but not cited for Count II or Count III of the Indictment.

SECTION 320 is as follows:

(Ch. 694, 49 Stat. 867)—(now Sec. 2114, New Title 18, U. S. C.)

"Whoever shall assault any person having lawful charge, control, or custody of any mail matter, with intent to rob, steal or purloin such mail matter or any part thereof, or shall rob any person of such mail matter or any part thereof, shall, for a first offense, be imprisoned not more than ten years; and *if in effecting or attempt to effect such robbery* (italics ours), he shall wound the person having custody of the mail, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years" (R. 16).

COUNT II of the Indictment, which is a matter for the consideration of the Court in this Petition For Review, stated:

> "The Grand Jury Further Charges:
>
> That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did, by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, Clerk in charge of Contract Station No. 44 of the Kansas City, Missouri, Post Office, located at 5744 Prospect" (R. 8).

On June 20, 1946, upon arraignment, the Petitioners entered pleas of not guilty to all counts, and the case was set for trial on July 8, 1946. On the day of the trial, Petitioners Bent and Jones withdrew their pleas of not guilty and entered pleas of guilty as to Counts I and III, leaving the plea as to Count II open until after the trial of Collins, and waived trial by Jury as to Count II. Collins (who is not involved in this Petition For Review) was tried on July 8, 1946, by the Court, and discharged on all three counts. Thereafter, Petitioners Bent and Jones entered please of guilty to Count II (R. 7), and on July 9, 1946, were found guilty by the Court of "putting in jeopardy by use of a dangerous weapon the life of a clerk in charge of a Post Office Contract Station, charged in Count II" (R. 3), and were sentenced on Count II to twenty-five years in prison. Petitioners, at the same time, were sentenced to one year and one day each on Counts I and III, to which they had previously pleaded guilty (R. 4).

On September 13, 1948, Petitioner Bent filed a Motion To Correct Sentence under Title 28, Sec. 2255, U. S. C. A., and his grounds for said Motion stated (R. 5, 6, 8):

> "(1) That the sentence imposed on Count II of the Indictment is illegal.

(2) That the Court had no jurisdiction to try this Defendant on Count II of said Indictment.

(3) That said Count II stated no offense against the United States."

On December 3, 1948, Judge R. M. Duncan, of The District Court Of The United States For The Western Division Of The Western District Of Missouri, vacated judgment and sentence under Count II of the Indictment as to both Petitioners, on the ground that Count II of the Indictment was fatally defective and charged no offense against the United States because it was defective in substance in failing to allege that the life of the postal clerk was placed in jeopardy *"in effecting or attempting to effect such robbery"* (Italics ours) (R. 9, 10).

Citing:

Michener v. *U. S.*, 170 F. 2d 973, 975, with approval from *Myers* v. *U. S.*, 15 F. 2d 977, 985.

"If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective."

Both of the cases cited discussed defects in form as provided in Sec. 556, Title 18, U. S. C. A., concluding that said Section related solely to defects of form and not to defects of substance.

On December 31, 1948, the United States District Attorney filed a Notice Of Appeal to the United States Court Of Appeals For The Eighth Circuit. Subsequently, Petitioners and the Government submitted Briefs (R. 10, 11, 12).

On June 20, 1949, the United States Court Of Appeals, Eighth Circuit, reversed the Order of Judge Duncan, stating:

> "The Second Count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the robbery charged in the First Count* (italics ours), put the life of the custodian in jeopardy by the use of a dangerous weapon" (R. 20).

and that though Count II was defective in failing to allege a material ingredient of the crime, namely: that the postal clerk's life was put in jeopardy by use of a dangerous weapon, *"in effecting or attempting to effect a robbery"* (Italics ours), said lack of a material essential allegation necessary to constitute any crime was merely a defect in form and not of substance (R. 20, 21, 22).

A Motion For Re-hearing was timely filed by Petitioners, the Court overruling the Motion on July 14, 1949 (R. 31).

Notice And Motion To Stay Issuance Of Mandate, and Notice Of Filing Petition For Review were filed by Petitioners on July 21, 1949, and Order Staying Issuance Of Mandate was filed by the Court on July 22, 1949 (R. 31, 32).

JURISDICTIONAL STATEMENT.

Petitioners invoke the jurisdiction of the court under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, and also invoked under the Rules of Practice and Procedure, promulgated May 7, 1934, pertaining to procedure after plea of guilty, verdict or finding of guilt, in criminal cases brought in the District Courts of the United States. The judgment and decree of the Circuit Court of Appeals for the Eighth Circuit was rendered June 20, 1949 (R. 24), and order denying motion for rehearing was rendered July 14, 1949 (R. 31). This Petition for Writ of Certiorari is being filed on or before August 13, 1949.

This court has jurisdiction to issue the Writ of Certiorari herein requested for the reason that the decree and judgment of the Circuit Court of Appeals is in direct conflict with the decisions of this, The United States Supreme Court, is in conflict with the decisions of the Circuit Courts of Appeals for the various circuits hereinafter set out, by case citation, and in direct conflict with the decisions of the Court of Appeals for the Eighth Circuit.

For the sake of brevity we will cite these cases in groups, with the substance of their holdings indicated by group number.

The Circuit Court of Appeals for the Eighth Circuit in the case at bar with reference to Count II of petitioners' indictment, which is the subject for consideration here before the court:

> "The Second Count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the robbery charged in the First Count* (italics ours), put the life of the custodian in jeopardy by the use of a dangerous weapon" (R. 20).
>
> "Despite its defects, we think that count II of the indictment was sufficiently informative, when read in the light of the applicable statute to which the indictment referred, the subject matter of the other counts, and the indictment as a whole, to support the sentences imposed upon the defendants" (R. 20).

By the ruling above quoted, together with the entire substance of the Opinion of the court, the Court necessarily held that the omission from the indictment of an essential element of the crime was a defect in form and not a defect in substance, and further that in determining on collateral attack, whether a count of an indictment charged an offense, each count of an indictment is not considered as if it were a separate indictment charging a distinct separate offense.

By so ruling, the Court erred and brought its Opinion into direct conflict with the following decisions:

[1]holding: In determining the sufficiency of a count of an indictment, each count must be treated as a separate indictment and not merely a part of the indictment in which it is found, and each count of an indictment must be sufficient within itself to support a conviction.

[2]in speaking of a specific count of an indictment, and using the word indictment as indicative of the specific count being considered, holding: All the material facts and circumstances embraced in the statutory offense must be stated in the indictment, or indictment will be defective and no essential element of the crime can be omitted without destroying the whole pleading (destroying the whole pleading referring obviously to the particular count of the indictment under consideration). The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital. Every ingredient of which the crime is composed must be clearly and accurately alleged.

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[1]*Dunn* v. *U. S.*, 284 U. S. 390, 393; *Selvester* v. *U. S.*, 170 U. S. 262, 263, 18 S. Ct. 580, 581; *Dealy* v. *U. S.*, 152 U. S. 539, 14 S. Ct. 680, 681; *Samuels* v. *U. S.*, 232 Fed. 536, 540; *Hood* v. *U. S.*, 43 F. 2d 353, 354; *McClintock* v. *U. S.*, (C. C. A. Kan., 1932) 60 F. 2d 839, 840; *DeJianne* v. *U. S.*, (C. C. A. N. J.) 43 F. 2d 353; *U. S.* v. *Grant*, (D. C. E. D. Mich.) 1 F. 2d 723; *Asgill* v. *U. S.*, (C. C. A. Va., 4th Cir.) 60 F. 2d 780; *Williams* v. *U. S.*, 151 F. 2d 736, 168 U. S. 382, 389; *Murphy* v. *U. S.*, 133 F. 2d 622; *Allen* v. *U. S.*, (4th Cir.) 89 F. 2d 954.

[2]*White* v. *U. S.*, 67 F. 2d 71; *Pettibone* v. *U. S.*, 148 U. S. 197, 202, 13 S. Ct. 542, 545, 37 L. Ed. 419; *Asgill* v. *U. S.*, (4th Cir.) 60 F. 2d 780, 784; *U. S.* v. *Hess*, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516; *U. S.* v. *Cruikshank*, 92 U. S. 542, 558, 23 L. Ed. 588; *U. S.* v. *Mills*, 7 Pet. 142, 8 L. Ed. 636; *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 538.

[3] in speaking of one count of a multiple count indictment holding: Where the challenge is based upon an omission in the averments thereof, of an essential element of a crime, objection thereto is not waived. The defendant may raise the question at any time on collateral attack, or after verdict for the first time, or after a plea of guilty. A defendant cannot waive lack of jurisdiction of subject matter. Sec. 556, T. 18, U. S. C., relates solely to defects in matters of form and does not change the rule which requires that the essential elements of an offense must be alleged.

QUESTIONS PRESENTED AND ERRORS TO BE URGED.

The United States Circuit Court of Appeals, 8th Circuit, conceded:

> "The Second Count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the roberry charged in the First Count* (italics ours), put the life of tne custodian in jeopardy by the use of a dangerous weapon" (R. 30).

Therefore, the error to be urged is: The Court erred in holding that the entire omission in Count II of an essential element of the crime apparently sought to be charged in Count II was merely a defect in form and not a defect of substance, the Court holding that this lack of substance could be supplied by inference from Count I.

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[3] *Harris* v. *U. S.*, (8th Cir.) 104 F. 2d 41, 43-45; *Michener* v. *U. S.*, 170 F. 2d 973, 975; *Hagner* v. *U. S.*, 285 U. S. 427, 431, 432, 433; *Myers* v. *U. S.*, 15 F. 2d 977, 985; *U. S.* v. *McKay*, 45 F. Supp. 1007; *Hewitt* v. *U. S.*, (8th Cir.) 110 F. 2d 1; *U. S.* v. *Eisenminger*, 16 F. 2d 816; *Goulson* v. *U. S.*, 16 F. 2d 44; *Sutton* v. *U. S.*, 157 F. 2d 661.

The questions presented are:

(1) Does Sec. 320, Title 18, U. S. C. A., define such a crime as "putting the life of a postal clerk in jeopardy by the use of a dangerous weapon"?

(2) Was any offense charged in Count II of the Indictment, other than: "putting the life of a postal clerk in jeopardy by the use of a dangerous weapon"?

(3) Even on a collateral attack, or an attack after a plea of guilty, must not a count of an indictment in and of itself contain the essential elements necessary to charge some offense, in order that that count might validly support a conviction and sentence?

(4) Did Petitioners, after their conviction on their plea of guilty to Count I, on July 8, 1946, by subsequently pleading not guilty to Count II and submitting themselves for trial on Count II, waive their Constitutional right (Const. Amendments V and VI) to set up as a defense to jurisdiction of the Court of Count II that they had previously been put in jeopardy by being convicted on Count I, where the record, as in this case, of itself and on its face, shows such facts to exist?

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

The Court conceded the fact that an essential element of an aggravated postal robbery was completely omitted from Count II. Count II omitted any reference to Count I, and omitted any allegation that it was in connection with a robbery or attempted robbery of a postal clerk in which Petitioners put the life of the postal clerk in jeopardy by the use of a dangerous weapon. Since the Court has conceded that this is a material allegation of fact, only one

conclusion can be reached, and that is, that the Trial Court had no jurisdiction to try, convict and sentence Petitioners on Count II, for Count II stated no offense against the United States. It was completely lacking in substance necessary to charge an aggravated form of postal robbery.

We feel that Judge Duncan, of the District Court, in his Opinion (R. 9, 10), very clearly analyzed the defect in Count II of the Indictment in question; that he analyzes it much better than we ourselves could do. Therefore we wish to quote from Judge Duncan's Opinion, as follows, and refer to the cases we believe Judge Duncan had in mind at the time he wrote his Opinion:

> "Sec. 320, Title 18, U. S. C. A., defines two offenses: one of assault with intent to rob; and the other, robbery of any person of mail matter. Upon conviction for either offense a defendant may be imprisoned for not more than 10 years. If in effecting or attempting to effect such robbery he shall wound the person having charge of such mail or shall put his life in jeopardy then his sentence shall be increased to 25 years.
>
> That part of the section which requires the penalty to be increased if the custodian is wounded or his life placed in jeopardy with a dangerous weapon while attempting to effect the robbery, does not create a new offense. It simply defines the conditions under which the penalty for one of the other offenses, that of robbery or attempted robbery, shall be increased. In the count under attack here it was sought to make of that part of the section a separate charge, which the statute does not authorize."[4]
>
> "Had the first count of the indictment, which charged the defendants with robbery, contained the

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[4]*U. S.* v. *Hunter*, (C. C. A. Ohio) 149 F. 2d 710; *U. S.* v. *Costner*, (4th Cir.) 139 F. 2d 432.

further charge that in effecting or attempting to effect such robbery the life of the custodian was placed in jeopardy by means of a deadly weapon, then it would have supported a sentence of 25 years,[5] but that is not the fact here. In the first count defendants were charged with robbery only and to that charge they entered a plea of guilty and were sentenced for periods within the time fixed by the statute."

"But even assuming that placing the life of the custodian in jeopardy with a deadly weapon while effecting or attempting to effect a robbery is a separate offense (with which assumption the courts disagree), the charge would still be defective because it fails to charge the most important element of the crime, that is, that his life was placed in jeopardy by the use of a dangerous weapon 'in effecting or attempting to effect such robbery.' Here he was charged with and convicted of putting in jeopardy the life of the clerk by use of a deadly weapon. Under the statute no crime was charged.

Defendants did not raise the question by way of motion to dismiss the indictment or objection to introduction of evidence. The defect in the indictment was not raised until this motion was filed on September 13, 1948. There being no crime charged against the defendants,[6] they did not waive their rights by their failure to make timely objections. It may be done at any time. The defect was one of substance and not of form.

In a very recent case, *Elliott W. Michener* v. *United States of America*, decided November 2, 1948, Judge Riddick of the 8th Circuit cites with approval from *Myers* v. *United States*, 15 F. 2d 977-985, the following:

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[5]*Blackwood* v. *U. S.*, (8th Cir.) 130 F. 2d 461, 462, 463.

[6]See cases cited in Footnotes 1 and 2 of our "Jurisdictional Statement"; and particularly *Harris* v. *U. S.*, 104 F. 2d 41, 43-45.

> 'No indictment found and presented by a grand jury * * * shall be deemed insufficient, nor shall a trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' (Citing U. S. C., Sec. 556).

and further that:

> 'If the indictment or information fails to allege any matter of substance, that is, any material ingredient of the crime, it is fatally defective. * * *'

> The count under which defendants were sentenced was fatally defective and did not charge any offense against them."[7]

In conclusion, Petitioners urge: (1) That Count II of the Indictment stated no offense against the United States; (2) That the Court had no jurisdiction to try, convict and sentence defendants to 25 years in prison on Count II; (3) That any defendant has the right to contest lack of jurisdiction of the court, where on the face of the court's own record it affirmatively shows that the Court did not have jurisdiction and affirmatively shows that the indictment, judgment and sentence based thereon was illegal; (4) That the District Court did not abuse its jurisdiction in recognizing a plain error in the Indictment, and that the Circuit Court of Appeals had no valid authority to reverse the District Court's Order, where the District Court violated no provision of the law in exercising its discretion; (5) That based upon the Circuit Court of Appeals' own method of gauging the sufficiency of Count II, namely: reading Count II in the light of the applicable statute to

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[7]*Harris* v. *U. S.*, 104 F. 2d 41, 43-45; and see also: Other cases cited under Footnotes 1 and 2 of our "Jurisdictional Statement."

which the indictment apparently referred, the subject matter of the other counts, and the indictment as a whole (R. 22), Count II stated in substance nothing but that "Defendants put the life of a postal clerk in jeopardy by the use of a dangerous weapon," which is not an offense against the United States. The Indictment was not sufficiently informative, even when gauged by the rules which the Circuit Court of Appeals used, because Count II was not sufficiently informative to apprize Petitioners of the crime with which they were charged and furnished them no basis for a plea of double jeopardy should they be again tried for an aggravated type of postal robbery. The Count not only misled the Petitioners, but misled the Trial Judge, Judge Collet, as evidenced by his judgment and sentence (R. 3, 4, 5), and misled the Assistant United States District Attorney who prepared the indictment, as evidenced by the contents of his Notice of Appeal (R. 11). Both the Trial Judge and the Assistant United States Attorney were confused as to what Count II charged, as evidenced by the way they expressed what was charged in Count II, shown by the numbered pages of the Record immediately above, *i. e.*: "Defendants having been convicted * * * to-wit: putting in jeopardy by the use of a dangerous weapon the life of a clerk in charge of a Post Office Contract Station, charged in Count II."

If the Court in this case permits the judgment of the Circuit Court of Appeals, Eighth Circuit, in the case at bar, to stand, this decision will completely destroy the very theory of separate counts of an indictment, and defendants could henceforward cite this case as being a completely valid reason for insisting that only one crime is being charged in any indictment, no matter in how many counts it may be drawn, where a violation of the same or similar crime is charged.

This judgment destroys the very purpose of separating an indictment into separate counts. The cases cited by the United States Court of Appeals in the case at bar (R. 20, 21): HAGNER; HEWITT; HARTWELL; WAGONER; ROSE, are based on entirely different defects in the counts of each of the indictments there involved. In each count of each indictment involved in each of those cases, the defect was strictly technical. All of the essential ingredients were alleged in each of the counts under consideration in those cases. The HAGNER case considered a one-count indictment, and the wording used therein, that the indictment could be looked to as a whole, necessarily referred to the one count when the word "indictment" was used therein. The HEWITT case is easily distinguished, in that the essential elements of the crime were alleged in each count, but were merely not defined as accurately as might have been possible. The same circumstances existed in the other cases cited by the Court. In the case at bar, we have an indictment in which Count II is wholly lacking in the essential elements to constitute any offense against the United States, and by no construction can it be said that it does constitute an offense against the United States. Therefore, the Petitioners feel that the Writ of Certiorari should be issued to the United States Circuit Court of Appeals, Eighth Circuit.

CONCLUSION.

It is respectfully submitted that a Petition for Writ of Certiorari should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 263

JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 14–23) is reported at 175 F. 2d 397.

JURISDICTION

The judgment of the Court of Appeals was entered June 20, 1949 (R. 23–24), and a petition for rehearing (R. 25–30) was denied July 14, 1949 (R. 31). The petition for a writ of certiorari was filed August 13, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the deficiency in the second count of the indictment, under which petitioners were sentenced to the mandatory penalty of 25 years' imprisonment, in failing to reallege the principal element of the offense charged in both the first and second counts, was so fundamental as to render the sentence void on collateral attack.

STATUTE INVOLVED

Section 197 of the Criminal Code (18 U. S. C. (1946 ed.) 320, now 18 U. S. C. 2114) provided:

> Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or any part thereof, or shall rob any such person of such mail matter, or of any money, or other property of the United States, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

STATEMENT

On May 28, 1946, petitioners were indicted in the District Court for the Western District of Missouri in three counts for the robbery of a post office and conspiracy (R. 1–3, 6). As to petitioners Bent and Jones, the charges in the first two counts were as follows (R. 1–3):

> *Count I*—On or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did rob Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect, of One Hundred Twenty-nine Dollars ($129.00) in lawful money belonging to the United States, said money being then and there in the custody of the said Luther H. Kieffer.
>
> *Count II*—That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did, by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect.

In each of these two counts a third defendant, Collins, was alleged to have aided and abetted petitioners. The third count involved all three defendants and charged a conspiracy to commit the robbery.

All the defendants first pleaded not guilty. Later, however, petitioners changed their pleas

on counts 1 and 3 to guilty and reserved their pleas on the second count until after the trial of Collins. Collins was acquitted after trial before the court without a jury. Petitioners then pleaded not guilty to count 2, waived a jury, and after trial were found guilty by the court. (R. 7.) On July 10, 1946, petitioners were each sentenced to imprisonment for the mandatory period of twenty-five years on the second count, and one year and a day on each of the other two counts to run concurrently with the sentence on the second count (R. 3–5). They did not appeal (see R. 18).

On September 13, 1948 (R. 8), after the sentences on counts 1 and 3 had expired, petitioner Bent filed a "motion to correct sentence" (R. 5–6). In substance, he contended that count 2 stated no offense against the United States. The District Court on December 3, 1948, held this count to be fatally defective, vacated the sentences, and ordered that petitioners be discharged from custody (R. 6–10).

On appeal by the Government, the Court of Appeals for the Eighth Circuit reversed the order of the District Court and directed it to order that petitioners be apprehended and restored to proper custody (R. 23–24).

ARGUMENT

At the outset, it is to be noted that the statute under which petitioners were indicted and con-

victed defines two offenses: (1) assaulting any person having lawful charge of mail matter or property of the United States with intent to rob, and (2) robbing any such person of such mail matter or property. The second part of the statute increases the penalty to a mandatory twenty-five years if, in attempting or effecting such a robbery, the defendant wounds the custodian or puts his life in jeopardy by the use of a dangerous weapon. The latter provision has been held not to create a separate offense, but to prescribe the conditions under which the penalty will be increased if either of the two offenses is committed in the aggravated form described by the statute. *Rowan* v. *United States,* 281 Fed. 137 (C. A. 5), certiorari denied, 260 U. S. 721; *Costner* v. *United States,* 139 F. 2d 429 (C. A. 4).

Petitioners' argument seems to boil down to the propositions that (1) no offense was stated in count 2 and (2) each count must stand on its own. They therefore conclude that the twenty-five-year sentence under count 2 must fall.

It is probably true that this count was faultily drawn and would have been open to direct attack. Obviously, it should have incorporated a reference to the robbery charged in the first count, because as it stands it merely charges that the defendants put the life of the postal clerk in jeopardy by the use of a dangerous weapon. It does not allege that this was done in effecting the robbery. But we believe that, as stated by

the Court of Appeals (R. 22), decision of the issue presented by the motion in the District Court should be governed by realities. The court referred to Rule 52 (a) of the Rules of Criminal Procedure as supporting this view. That Rule provides that "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

It is true that ordinarily each count of an indictment should stand on its own except as it may incorporate allegations from another by reference. *Dunn* v. *United States,* 284 U. S. 390, 393; *Hood* v. *United States,* 43 F. 2d 353, 354 (C. A. 10). Yet this is not true in all cases. In *Dimmick* v. *Tompkins,* 194 U. S. 540, 551, this Court said:

> Although for some purposes the different counts in an indictment may be regarded as so far separate as to be in effect two different indictments, yet it is not true necessarily and in all cases.

Under the test of effect upon petitioners' substantial rights, we think it is clear that they were in no wise prejudiced by the technically faulty indictment. The indictment referred to the statute and petitioners must have known that the purpose of the second count was to charge the aggravated degree of the robbery clearly alleged in the first. They pleaded guilty to the first and third counts, obviously because they had no defense to them. As the Court

of Appeals stated (R. 22), "Their pleas of not guilty to the second count were, doubtless, induced by the fact that whether they were convicted on that count after trial or on a plea would make no difference, since the court, by virtue of the statute, would, in any event, have to impose a sentence of 25 years imprisonment." That petitioners were under no misapprehension and clearly understood the charges against them is further evidenced by their failure to challenge the sufficiency of the second count either in the trial court or by way of appeal. In these circumstances we think the case comes within the principle so aptly stated in *Lucas* v. *United States,* 158 F. 2d 865, 867 (C. A. 4), certiorari denied, 330 U. S. 841:

> If the question of the sufficiency of the indictment had been raised upon the trial by demurrer, motion to quash or motion for bill of particulars and had been presented by appeal from the judgment, a new trial would doubtless have been granted for error in the proceedings. A very different situation is presented, however, where the question is not raised upon the trial; for it is well settled that, where this is not done, the indictment must be held sufficient, "unless so defective that by no reasonable construction can it be said to charge the offense for which the defendants were convicted." *Muench* v. *United States,* 8 Cir., 96 F. 2d 332, 334–335.

Here there is not even an allegation as to how the petitioners were in any way misled or otherwise prejudiced by the form of the indictment. While it is true that petitioners were erroneously sentenced under both of Counts I and II, as though they stated separate offenses, petitioners have not been prejudiced because their sentences under Count I ran concurrently with the mandatory 25-year sentences under Count II.

The court below rightly concluded that there is "no logic or justification in punishing poor, but nonprejudicial, criminal pleading" (R. 23) by releasing petitioners from service of the mandatory sentences imposed for an offense of which they were fairly convicted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

No. 263.

JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Supreme Court of the United States

No. 263.

JOSEPH F. BENT AND WILLIAM AMOS JONES,
PETITIONERS,

VS.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

To the United States Supreme Court, and the Honorable Judges Thereof:

Joseph F. Bent and William Amos Jones, petitioners pray a rehearing on their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in the case of United States of America, Appellant, vs. Joseph F. Bent and William Amos Jones, Appellees, No. 13906, entered June 20th, reversing the order of the United States District Court for the Western District of Missouri that was rendered December 3rd, 1948, said order setting aside judgment and sentence of petitioners, rendered against petitioners on July 10th, 1946, on count two of their indictment.

OPINIONS BELOW.

Circuit Court of Appeals Opinion (R. 14-23) is reported at 175 F. 2d 397. District Court Opinion (R. 6-10). Order of Supreme Court entered October 10th, 1949, official citation unknown as yet to petitioners.

JURISDICTION.

The order of the Supreme Court of the United States denying certiorari was entered on October 10th, 1949, and by a timely application to this court, an order extending the time to file this petition for rehearing to and including November 14th was made by Judge Fred M. Vinson, Chief Justice of the United States. This petition is being filed on or before November 14th, 1949. The jurisdiction of this court is invoked under 28 U. S. C. A., Sec. 1254 (1). See also, Rule 37 (b) of the Federal Rules of Criminal Procedure, promulgated by the Court February 8th, 1946, and Rule 33 of the Rules of the Supreme Court of the United States as amended October 13th, 1947.

QUESTIONS PRESENTED.

From the whole record in the case, is it not clear, that Count II of petitioners' Indictment stated no offense against the United States of America? If so, will not this court recognize and correct this error and correct under its power to recognize plain errors affecting substantive rights as provided in Rule 27 of the Rules of the Supreme Court, 28 U. S. C. A. foll. Sec. 354.

STATUTE INVOLVED.

Section 197 of the Criminal Code (18 U. S. C. (1946 ed.) 320, now 18 U. S. C. 2114) provided:

> Whoever shall assault any person having lawful charge, control, or custody of any mail matter or of any money or other property of the United States, with intent to rob, steal, or purloin such mail matter, money, or other property of the United States, or any part thereof, or shall rob any such person of such mail matter, or of any money, or other property of the United States, or any part thereof, shall, for the first offense, be imprisoned not more than ten years; and if in effecting or attempting to effect such robbery he shall wound the person having custody of such mail, money, or other property of the United States, or put his life in jeopardy by the use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years.

AMENDMENTS V AND VI OF THE CONSTITUTION AND FEDERAL RULES OF CRIMINAL PROCEDURE.

Rule 52, of the Federal Rules of Criminal Procedure, is as follows:

> "Rule 52—Harmless Error and Plain Error.
>
> (a) Harmless Error. Any error, defect, irregularity, or variance, which does not affect substantial rights shall be disregarded.
>
> (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed, although they were not brought to the attention of the Court."

As shown by the notes of the Advisory Committee on Rules, Rule 52 (a) is a re-statement of existing law 28

U. S. C. A., Sec. 391, and with reference to indictments is a re-statement of the law 18 U. S. C. A., Sec. 556. This rule pertains to formal or technical defects which do not affect the substantial rights of a defendant. Rule 52 (b) is a re-statement of existing law (*Wiborg* v. *U. S.*, 163 U. S. 632, 658, 16 S. Ct. 1127, 1197—and many other decisions).

Rule 52 embraces Rule 27 of the Rules of the Supreme Court, 28 U. S. C. A. foll. Section 354, which provides that errors not specified will be disregarded, save as the Court, at its option, may notice a plain error not assigned or specified.

Constitution of the United States—

Amendment (V).

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment (VI).

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATEMENT.

On May 28, 1946, petitioners were indicted in the District Court for the Western District of Missouri in three counts (R. 1-3, 6). As to petitioners Bent and Jones, the charges in the first two counts were as follows (R. 1-3):

> *Count I*—On or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did rob Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect, of One Hundred Twenty-nine Dollars ($129.00) in lawful money belonging to the United States, said money being then and there in the custody of the said Luther H. Kieffer.
>
> *Count II*—That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones did, by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, clerk in charge of Contract Station No. 44 of Kansas City, Missouri Post Office, located at 5744 Prospect.

In each of these two counts a third defendant, Collins, was alleged to have aided and abetted petitioners. The third count involved all three defendants and charged a conspiracy to commit the robbery.

All the defendants first pleaded not guilty. Later, however, petitioners changed their pleas on counts 1 and 3 to guilty which were accepted by the court on July 8, 1946, and reserved their pleas on the second count until after the trial of Collins. Collins was acquitted after trial before the court without a jury. Petitioners then pleaded not guilty to count 2, waived a jury, and after trial were found guilty by the court on July 9, 1946 (R. 7). On July 10, 1946, petitioners were each sentenced to imprisonment

for the mandatory period of twenty-five years on the second count, and one year and a day on each of the other two counts to run concurrently with the sentence on the second count (R. 3-5). They did not appeal (see R. 18).

On September 13, 1948 (R. 8), after the sentences on counts 1 and 3 had expired, petitioner Bent filed a "motion to correct sentence" (R. 5-6). In substance, he contended that count 2 stated no offense against the United States. The District Court on December 3, 1948, held this count to be fatally defective, vacated the sentences, and ordered that petitioners be discharged from custody (R. 6-10).

On appeal by the Government, the Court of Appeals for the Eighth Circuit reversed the order of the District Court and directed it to order that petitioners be apprehended and restored to proper custody (R. 23-24).

SPECIFICATIONS OF ERROR TO BE URGED.

Court of Appeals erred in holding that count 2 of the indictment stated an offense against the United States.

This error is plain, is substantial, and is in violation of constitutional rights and warranting correction by this court.

ARGUMENT.

Defendants recognize the rule that, after verdict, where no question was raised as to the sufficiency of their Indictment, the Indictment must be held sufficient "unless so defective that by no reasonable construction can it be said to charge the offense for which Defendants were convicted." *Muench* v. *U. S.*, (8th Cir.) 96 F. 2d 332, 334-35, but count 2 sought to charge the means of aggravation

under the second section of Sec. 320, Title 18, U. S. C. A., as being an offense, which the statute does not authorize.

The aggravating means have been held not to constitute an offense but merely to ordain the acts warranting the increased penalty. See *Castner* v. *United States,* 139 F. 2d 429 (C. A. 4); *Rowan* v. *United States,* 281 Fed. 137 (C. A. 5), certiorari denied 260 U. S. 721.

The sentence imposed on count 2 is therefore void, as it is in excess of what could lawfully be imposed on the other two counts.

The Circuit Court of Appeals, 8th Circuit, in its Opinion (R. 20), stated:

> "The second count, standing alone, was concededly defective in failing to allege that the defendants, *in effecting the robbery charged in the first count,* put the life of the custodian in jeopardy by the use of a dangerous weapon" (Italics ours).

The Court conceded that Count II lacked an essential element of the offense of armed postal robbery, yet said Court justified its ruling by saying that this omission was a defect in form and not of substance and was thereby cured by virtue of Section 556, Title 18, U. S. C. A., c. 31, 48 Stat. 58, which provides:

> "No indictment found and presented by a Grand Jury in any District or other Court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding thereon be affected, *by reason of any defect or imperfection in matter of form only,* which shall not tend to prejudice the defendant."

The Court also cites Rule 52 (a) of the Rules of Criminal Procedure for the United States District Courts (18 U. S. C. A.), which became effective March 21, 1946, providing:

> "Any error, defect, irregularity, or variance, which does not affect substantial rights shall be disregarded" (R. 21, 22).

The advisory committee notes to Rule 52(a), U. S. C. A., Title 18, say that this rule is merely a restatement of existing law, *i. e.*, 18 U. S. C. 556, permitting formal defects to be ignored.

Rule 52(b) provides that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

In *Harris* v. *U. S.*, (8th Cir.) 104 F. 2d 41, 43-45, in speaking of count 4 of an indictment under collateral attack.

> "However, where the challenge to an indictment is based upon an omission in the averments thereof of an essential element of a crime, objection thereto is not waived."

Citing: *Berry* v. *U. S.*, (9th Cir.) 259 Fed. 203.

Citing: *U. S.* v. *Hess,* 124 U. S. 483, 8 S. Ct. 571, 574, 31 L. Ed. 516; *U. S.* v. *Carll,* 105 U. S. 611, 26 L. Ed. 1135:

> "It is the duty of the Court under such circumstances to set aside the judgment."
>
> "The essential elements of a statutory offense must be set out in the indictment. These are matters of substance and not of form, and their omission is not aided or cured by verdict."

In this case of *Harris* v. *U. S.*, set out above, the Court was determining whether or not Count IV stated an offense. A reading of the case clearly shows that when the word "indictment" was used, it was used as expressive of Count IV of the indictment and not of the indictment as a whole.

By way of further justifying its opinion, the Circuit Court of Appeals, in the case at bar, stated:

> "Despite its defects, we think that Count II of the indictment was sufficiently informative, when read in the light of the applicable Statute to which the indictment referred, the subject matter of the other Counts, and the indictment as a whole, to support the sentences imposed upon the Defendants."
>
> "The Second Count should be construed to mean what the defendants, their counsel, and the trial court construed it to mean when Bent and Jones entered their pleas of not guilty, were tried, and were sentenced."

We wish to point out, step by step, the errors committed by the Circuit Court of Appeals in its application of the cases cited, and the law (*i. e.*, Sec. 556, Title 18, U. S. C. A., and Rule 52 (a)) to the defect in substance in Count II of the indictment here in question.

Count II stated (R. 1):

COUNT II.

The Grand Jury further charges:

> "That on or about the 2nd day of January, 1946, at Kansas City, Missouri, Joseph F. Bent and William Amos Jones, did by the use of a dangerous weapon, put in jeopardy the life of Luther H. Kieffer, clerk in charge of Contract Station No. 44 of the Kansas City, Missouri, Post Office, located at 5744 Prospect."

Count II, in substance, states that Petitioners put the life of a postal clerk in jeopardy by the use of a dangerous weapon. Under no law of the United States does the putting of the life of a postal clerk in jeopardy by use of a dangerous weapon constitute a crime. If the pleader meant to allege an aggravated offense of postal robbery, namely:

the robbing of a clerk of a Post Office by use of a dangerous weapon, he should have included the fact that the postal clerk's life was put in jeopardy by use of a dangerous weapon "in effecting or attempting to effect a robbery" or should have impleaded by reference such allegation from Count I. The above clause in quotations is a definite material allegation necessary to constitute a crime under the latter portion of Section 320, wherein a sentence of 25 years is prescribed.

Sec. 320, Title 18, U. S. C. A., is as follows (R. 16):

> "Whoever shall assault any person having lawful charge, control or custody of any mail matter, with intent to rob, steal, or purloin such mail matter or any part thereof, or shall rob any such person of such mail or any part thereof, shall for the first offense be imprisoned not more than ten years; and *if in effecting or attempting to effect such robbery* (italics ours), he shall wound the person having custody of the mail, or put his life in jeopardy by use of a dangerous weapon, or for a subsequent offense, shall be imprisoned twenty-five years."

One reading of Section 320 clearly shows that the offense of putting the life of a postal clerk in jeopardy by use of a dangerous weapon is, by itself, not a crime. It must be done "in effecting or attempting to effect such robbery." Nowhere in Count II of the indictment is there any language, which by the wildest stretch of the imagination, could be said to charge that the postal clerk's life was put in jeopardy by use of a dangerous weapon in effecting or attempting to effect a robbery.

The lack of any such allegation in Count II causes Count II to be fatally defective, because it does not charge an offense against the United States. The omission of this vital, necessary element of the crime, which we can only guess the pleader sought to charge in Count II, is an

omission of a material ingredient of the crime, it thereby being a defect in substance and not a defect in form, with which Sec. 556, Title 18, U. S. C. A., deals.

Rule 7, Federal Rules of Criminal Procedure for the District Courts of the United States, effective March 21, 1946, states:

> "(c) Nature and Contents.—The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * * *The allegations made in one count may be incorporated by reference in another count* (Italics ours). The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged therein to have violated * * *."

Clearly, from reading Rule 7, it is obvious that the essential allegations necessary to constitute an offense cannot be supplied from one count into another, unless said material allegations are impleaded by reference.

No allegations were impleaded in Count II of the indictment by reference of any kind. The Petitioners are not contending that the failure to state for Count II an official citation of the Statute is any ground for holding Count II defective, but they do contend that the endorsement at the top of the indictment forms no part of the indictment and nothing can be inferred from the endorsement; as was resorted to by the court of appeals in its opinion (R. 22):

> "The law at present regards citations to statutes or regulations as not part of the indictment."
>
> *Williams* v. *U. S.*, 168 U. S. 382, 389, 18 S. Ct. 92, 42 L. Ed. 509.
>
> *U. S.* v. *Hutcheson*, 312 U. S. 219, 229, 61 S. Ct. 463, 85 L. Ed. 788.

The Court erred in stating that Count II should be construed in the light of:

(1) "The applicable *Statute to which the indictment referred*" (R. 22).

As previously pointed out, the citation of the Statute forms no part of the Indictment.

(2) "*The subject matter of the other counts*" (R. 22).

The subject matter of the other counts cannot be inferred into Count II to supply Count II with the material ingredient which is lacking therefrom. (This would constitute an amendment of the indictment in violation of petitioners' right to be tried only on indictment of grand jury—Const. Amends. 5 and 6, U. S. Const.)

Dunn v. *U. S.*, 284 U. S. 390, 393.

Citing: *Selvester* v. *U. S.*, 170 U. S. 262, 18 S. Ct. 580, 581:

> "In determining the sufficiency of an indictment each count of an indictment is regarded as if it was a separate indictment."
>
> "Each count is, in fact and theory, a separate indictment."
>
> *Hood* v. *U. S.*, 43 F. 2d 353, l. c. 354.

Citing: *Samuels* v. *U. S.*, 232 Fed. 536, 540; *Dealy* v. *U. S.*, 152 U. S. 539, 14 S. Ct. 680, 681:

> "In determining the sufficiency of an indictment, each count must be treated as a wnole and not merely as a part thereof. Each count is in form a distinct charge of a separate offense, and hence a verdict of guilty or not guilty as to it is not responsive to the charge in any other count."

Samuels v. *U. S.*, 232 Fed 536, 540, 146 C. C. A. 494:

"In determining the sufficiency of an indictment, each count must be treated as a whole and not merely as a part thereof."

McClintock v. *U. S.*, (C. C. A. Kan., 1932) 60 F. 2d 839, 840:

"Each count of an indictment is regarded as if it were a separate indictment, and must be sufficient in itself."

DeJianne v. *U. S.*, (C. C. A. N. J., 1922) 43 F. 2d 353:

"An indictment or information in several counts is a collection of separate bills against the same defendant for offenses, which on their face appear distinct, under one caption and endorsed collectively as true by the Grand Jury, and every separate count should charge the defendant as if he had committed a distinct offense."

U. S. v. *Grant*, (D. C. E. D. Mich., 1924) 1 F. 2d 723:

"Each count in an indictment must be treated as a separate and distinct indictment."

Asgill v. *U. S.*, (C. C. A. Va., 1932) 60 F. 2d 780:

"Each count is a distinct charge of a separate offense."

"Each count in an indictment must be treated as a separate and distinct indictment."

Horn v. *U. S.*, 182 Fed. 721, 105 C. C. A. 163.

Hyde v. *U. S.*, 198 Fed. 610, 119 C. C. A. 493.

Asgil v. *U. S.*, (C. C. A., 4th Cir.) 60 F. 2d 780, 794.

Citing: *Pettibone* v. *U. S.*, 148 U. S. 197, 202, 13 S. Ct. 542, 545, 37 L. Ed. 419:

"The general rule in reference to an indictment is that all the material facts and circumstances of the of-

fense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially by way of recital."

Citing: *U. S.* v. *Hess*, 124 U. S. 483, 486, 8 S. Ct. 571, 31 L. Ed. 516.

And citing the following from *U. S.* v. *Cruikshank*, 92 U. S. 542-558, 23 L. Ed. 588:

(With approval from *U. S.* v. *Mills*, 7 Pet. 142, 8 L. Ed. 636, and *U. S.* v. *Cook*, 17 Wall. 174, 21 L. Ed. 538.)

"The indictment must set forth the offense with clearness and all necessary certainty, to apprize the accused of the crime with which he stands charged, and every ingredient of which the offense is composed must be accurately and clearly stated."

And further in considering Sec. 1025, Rev. Stat., 18 U. S. C. A., Sec. 556, l. c. 784, states:

"While giving full effect not only to the letter but to the spirit of the statute, it must be considered in connection with the Sixth Amendment of the Constitution, which requires that the defendant be informed of the nature and cause of the accusation, this information to be set out through an indictment by the Grand Jury as guaranteed in the Fifth Amendment."

"General and undefined charges of crime should not be encouraged. They are not in harmony with the genius of a free people living under a written Constitution."

U. S. v. *Denny*, (7th Cir.) 165 F. 2d 671, Cert. Denied 68 S. Ct. 662:

"Of course the statutory provision that no indictment shall be insufficient by reason of any defect in form only, which shall not tend to the prejudice of the

defendant, 18 U. S. C. A., Sec. 556 * * * and 28 U. S. C. A. * * * grants power to the court to ignore only formal imperfections * * *. For to extend it to include the further power to permit amendment of an indictment in any matter of substance would offend against the same Constitutional provision * * * Fifth Amendment."

CONCLUSION.

Petitioners pray they be granted a rehearing on their petition for certiorari.

Counsel certifies that this petition for rehearing is made in good faith and not for delay.

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